Supreme Court of the United States

OCTOBER TERM, 1945.

No. 786.

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,
VS.
DONNELLY GARMENT COMPANY, A CORPORATION; DONNELLY GARMENT WORKERS' UNION; AND INTERNATIONAL LADIES' GARMENT WORKERS' UNION.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR RESPONDENT, DONNELLY GARMENT COMPANY, IN OPPOSITION.

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OPINIONS BELOW.

The opinions of the Circuit Court of Appeals (XIII, 7-64) are reported in 151 F. 2d 854. Prior opinions of the

Circuit Court of Appeals in this case are reported in 123 F. 2d 215.

JURISDICTION.

The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code as amended by the act of February 13, 1925, and Section 10(e) and (f) of the National Labor Relations Act.

THE FACTS AND ISSUES.

The Petitioner does not fairly state the facts or evidence.

The Petitioner does not correctly state the issues, but presents hypothetical questions.

Petitioner's Statement of Facts.

Petitioner by a distorted statement of the evidence attempts to make it appear that, on the facts, the decision below has grievously frustrated the Labor Board in carrying on its legitimate objectives (p. 32). The exact opposite is true—the Labor Board for seven years has sought to prevent the Donnelly employees from having the union of their own selection—a choice not merely by a majority but by 100% of the employees (see excerpt from Judge Riddick's opinion, XIII, 55), and has sought to punish respondent for having recognized and dealt with that union, as an employer is specifically required to do by the National Labor Relations Act (29 U. S. C. A., Sec. 159).

Petitioner's statement is extremely distorted in that throughout it *assumes* as proved by substantial evidence the very matters which are in controversy.

For example, at page 15, Petitioner says that "Todd called a meeting of employees during working hours on April 27, 1937" (the organization meeting of the Donnelly Garment Workers' Union), whereas the Trial Examiner found in his first intermediate report that the meeting was held after working hours (A. 526), and the actual and offered testimony of the 1,200 employees was that it was held after working hours (III, 760; VIII, 2565, 2623, 2917, 3003, 3078, 3187 and 3253).

Practically every other statement in Petitioner's statement of facts is subject to the same criticism.

We are cognizant of the rule that the Board's findings, if supported by the evidence, are conclusive; but that rule is not applicable here where the Court below did not reach the merits (XIII, 37, 51). Implicit in the rule that the Board's findings are conclusive is the prerequisite rule that the Board shall have first given a proper hearing and have received and considered the competent and material evidence offered by the respondent—and whether the Board did that here was the issue before the Court below.

Petitioner's Statement of the Issues.

Petitioner's statement of the "Questions Presented" (p. 2) is even more unfair and incorrect. They present hypothetical issues, not the real issues. Petitioner assumes as facts the very matters which are in controversy and leaves out facts and evidence which were before the Court below and, on such premise asks, did the Court below err? Such issues are, therefore, hypothetical and for this Court to pass upon the issues as presented by Petitioner would not answer the question whether the Court below erred.

For illustration, we refer to Petitioner's Question 1(a) (at p. 2), which assumes that the employer "through his

supervisory staff sets up and thereafter takes a leading part in the administration of a plant union." That statement assumes as a fact the principal controverted question in the case. The Court below did not pass on any question or matter involving that assumption.

Practically every other of the "Questions Presented" by the Petitioner contains the same vice.

THE REAL ISSUES.

The issue upon which the Court below based its refusal to enforce the Board's order was whether respondent was denied a fair trial by the Board's refusal to receive and consider certain evidence and by its refusal to designate a different trial examiner to conduct the second hearing. These matters are set forth in the Court's opinion at XIII, 38-51. The issue as to whether the Board's findings and order were supported by the evidence was not reached by the Court below (XIII, 37). The issue here on application for certiorari is not whether the Court below was wrong in some one or more of these rulings, but whether the decision of the Court below is so completely wrong, in all respects, as to constitute an abuse of the Court's power and discretion.

SUMMARY OF ARGUMENT.

Certiorari should not be granted for the following reasons:

I. The Court below, in refusing to enforce the Board's order, did not abuse the power and discretion vested in it by Congress.

(a) The Court was "not in error" in ruling that the Board should have received and considered the offered evidence.

(b) The Court was "not in error" in ruling that the Board should have designated a different Trial Examiner for the second hearing.

(c) In any event, the Court's rulings were not so completely wrong as to constitute an abuse of the Court's judicial power and discretion.

II. The decision of the Court below does not involve questions of such importance or character as to call for the issuance of certiorari by this Court.

III. The decision below does not conflict with decisions of this Court or with decisions of other circuits.

ARGUMENT.

I.

The court below did not abuse its power and discretion in refusing enforcement of the Board's order.

In *National Labor Relations Board* v. *Indiana and Michigan Electric Co.*, 318 U. S. 9, this court said (at p. 28):

> "But courts which are required upon a limited review to lend their enforcement powers to the Board's orders *are granted some discretion* to see that the hearings out of which the conclusive findings emanate *do not shut off* a party's right to produce evidence or conduct cross examination material to the issue. * * * Findings cannot be said to have been fairly reached unless material evidence which might impeach, as well as that which will support, its findings, is heard *and weighed.*"

and at p. 16:

> "Thus, in order to decide this case in favor of the Board we would have to hold not merely that the evidence of dynamiting would be a matter of indifference in our view of the case but that the court designated by statute to exercise discretion in the matter and which desired to know the facts about it before passing on the sufficiency of the evidence and the impartiality of the examiner and which thought the finder of the facts should hear and consider such evidence, must *not only have been in error* but must *also have abused* its judicial discretion."

The foregoing ruling is applicable here. Although that ruling was made upon an application to adduce additional evidence yet the same reasoning is applicable in

a proceeding to enforce an order of the Board. The Circuit Court of Appeals is the court vested by Congress with the power of determining whether the Board's orders shall be enforced. Of course, that is not an uncontrolled power, but certainly it carries a wide latitude and range of discretion and judgment to be exercised by the court, especially as to evidentiary matters and procedural questions, which are the type of matters ruled on in this proceeding.

This Court should no more review the decision of the Circuit Court of Appeals in its decision upon these fact questions than the Circuit Court of Appeals should review the decision of a trial court upon similar fact questions—as held by this Court in the recent case of *United States* v. *Johnson*, decided February 4, 1946, where the Court said (90 L. Ed. Advance Opinions 389, l. c. 391):

> "But it is not the province of this Court or the Circuit Court of Appeals to review orders granting or denying motions for a new trial when such review is sought on the alleged ground that the trial court made erroneous findings *of fact*" (Citing cases).
>
> "While the appellate court might intervene when the findings of fact are wholly unsupported by evidence" (Citing cases), "it should never do so where it does not clearly appear that the findings are not supported by any evidence."

Under the above quoted cases, certiorari should not be granted herein unless the Court below "not only is in error" but also unless the bases of its decision are so utterly groundless that it has "abused its judicial power and discretion."

Neither of such conditions exists here:

(a)

THE COURT BELOW WAS "NOT IN ERROR" IN RULING THAT THE BOARD SHOULD HAVE RECEIVED AND CONSIDERED THE PROFFERED EVIDENCE.

The Court below bases its decision as to the exclusion of evidence on the Board's refusal to receive and consider evidence as to six different matters (XIII, 40-50).

This Court's ruling in the *Indiana and Michigan case, supra* (l. c. 16), would apply if only *one* material class or item of evidence had been excluded by the Board. We submit that the Court below was right as to all six classes. Each of these types of evidence was directly relevant and material to some phase of the case as to which Board made findings adverse to respondent. We briefly discuss the various types of evidence excluded:

(1) Evidence of conspiracy by ILGWU.

In *NLRB* v. *Indiana and Michigan Electric Co., Supra,* this Court in passing upon the materiality of evidence of violence and lawlessness engaged in by the petitioning union held (headnote 1) that—

> "the dynamiting and other acts of violence might have explained the preference expressed by some employees for the latter union, which preference had been wholly disbelieved by the Board, and, on the whole case, it would seem that the Board ought to have considered the dynamiting, along with the other evidence, before reaching any final conclusion in the case."

And the Court also held (l. c. 20) that such evidence would go to the

> "fairness of giving absolute finality to the Board's findings of fact" and also (l. c. 24) would bear on the

employees' "good faith in testifying to the reasons for preferring an association of their own to Local B-9."

The excluded evidence here, with reference to the conspiracy, unlawful activities, and threats of the complaining union, ILGWU against the Donnelly company and its employees, comes within the same category as that ruled upon by this Court in the *Indiana and Michigan case, supra*. The excluded evidence here would have shown that the ILGWU was threatening to subject the Donnelly employees to physical violence and to the humiliation of having their clothing stripped from them in the public streets, as the ILGWU had been doing in its other strikes (A. 488-491; IV, 1216, 1228, 1273, 1275, 1302, 1305; V, 1412, *et seq.*, 1477, 1483, 1511, 1527, 1546; XII, 4195) as well as endangering their jobs and right to go to and from their work in peace and security. These were vital rights—rights which respondent's employees might be expected to protect and preserve to themselves by every lawful means, without any "coercion" by respondent. This evidence, therefore, had a direct bearing on the principal issue here, of "domination."

The Board refused to receive such testimony or to let respondent go into any of the matters relating to such conspiracy (A. 509) which were pleaded as a defense in Part B of respondent's answer (A. 387-394), but struck that part of respondent's answer (A. 508) and rejected respondent's offer of proof (III, 742d; VIII. 2562) on Part B of its answer.

Such evidence was also competent and material because it would throw light on many controverted issues as to which the Board made adverse findings, and also would bear on the good faith, truthworthiness and reasonableness of the testimony of respondent's employees as

to how and why they formed the Donnelly Garment Workers' Union, as well as upon that of respondent's officials. (*Indiana and Michigan case, supra*, l. c. 24).

The Court below "was not in error" in holding that such evidence should have been received and considered by the Board.

(2) Refusal of Board to consider employees' testimony as directed by the Circuit Court of Appeals in its former decision.

The Court in its previous opinion (123 F. 2d 215) held that the testimony and offered testimony of the "1,200 employees" of respondent as to "how and why" they came to form and join the Donnelly Garment Workers' Union and that they did so freely and without any domination, coercion or interference by the employer, was competent and *material* testimony and should have been received *and considered* by the Board. We do not argue that all 1,200 witnesses should have been permitted to take the stand; but that the testimony of those who did testify as to such matters should have been accepted by the Board *as being material* to the issues and should have been fairly weighed and considered by the Board *as material*, in accordance with the previous opinion of the Court below, and that the offered testimony of the remaining 1,200 employees having been rejected as *cumulative*, should have been considered as though the "1,200 witnesses" had actually testified thereto (as Judge Riddick held XIII, 53). But the Trial Examiner and the Board *refused to regard this evidence as having any materiality whatsoever*. The Trial Examiner repeatedly said in the first trial that it was wholly worthless and he would not consider it (A, 484-487, 492-3). In the second hearing, although he permitted eleven employee witnesses to testify and it was conceded that the remaining 1,200 employees would testify substantially the same way, this overwhelming proof did

not move him one jot or tittle and he blandly finds in his second Intermediate Report, as in his first, that the employees were "coerced" by the employer into forming the Donnelly Garment Workers' Union, thereby necessarily holding that each and all of these 1,200 witnesses either committed perjury or that they were practically morons, who did not know when duress was being applied to them.

That the Trial Examiner completely disregarded and refused to consider the employees' testimony is conclusively shown by the fact that in his Intermediate Report the only mention made by him of this testimony—obviously the most important evidence in the case—is at X, 3838, where he says "the undersigned accorded the respondent and the Donnelly Garment Workers' Union an opportunity to introduce all of the competent and material evidence which was rejected at the prior hearing * * *," and then after devoting 40 printed pages to the recitation of other evidence, mostly circumstantial, and without once mentioning that the 1,200 employees say there was no coercion, the Trial Examiner at X, 3888, says: "*On all the evidence* the undersigned finds the respondent dominated and interfered with the formation and administration of the Donnelly Garment Workers' Union * * *"! A more flagrant disregard of important evidence and flaunting of the Court's ruling can hardly be conceived, unless it be that of the Board itself to which we now turn.

The Board was more blunt in stating its disregard for the evidence which the Court had ruled was material. The Board adopts the Trial Examiner's intermediate report word for word (A, 618) save for a minor correction (A, 620) and bluntly says that it "adheres to its opinion," that the employees' testimony has no materiality upon the issue of domination— "* * * we are moreover impelled to adhere to the opinion, derived from our experience in

administration of the Act, that *conclusionary* evidence of this nature is *immaterial* to issues such as those presented in this case" (A, 619).

The Board lamely attempts to side step its open avowal that it deems said evidence immaterial by saying that it "carefully considered all such evidence" (A, 619). It seems, obvious, however, that no *bona fide* consideration was given by the Board to evidence which it avowedly treated as immaterial. The respondent gained nothing by the Court's remand of the case to the Board to "receive *and consider*" (XIII, 5) the excluded evidence. It was the same as though the Board had again refused to receive it at all. The Board's refusal to accept the spirit of the Court's decision made the remand a mere farce. As said in *De Bardeleben* v. *National Labor Relations Board,* (C. C. A. 5) 135 F. 2d 13, l. c. 14-15:

> "The finding of the board that the acts of the employees in forming their own association were not their voluntary acts but were the results of domination, interference and support by the company, *in the face of the positive evidence of those who formed the organization* that this was not so, and with no evidence to the contrary, *is a mere fiat.*"

And in *Humble Oil & Refining Co.* v. *National Labor Relations Board,* (C. C. A. 5) 113 F. 2d 85, l. c. 91:

> "*If human testimony can establish anything,* it establishes that Humble did not dominate or interfere with the organization of either Federation."

Nor was this "conclusionary" evidence, as it is referred to by the Board. It is testimony as to *facts.* The witnesses were asked, not only, "did you join the DGWU of your own free will," but were asked questions such as these: "Did any officer, executive or anyone that you

thought was representing the management talk to you about the meeting?" (of April 27th) (VIII, 2565): "Now, prior to that meeting; had anyone, any officer, executive, or anyone representing the management, suggested to you or suggested to anybody else in your presence that the employees form a union?" (VIII, 2566); "Did any official, executive, or representative of the management request you to sign the petition?" (of March 2nd) (p. 2578); "Did you gain the impression from any source, or did you understand that the Loyalty League had anything to do with the formation of the Donnelly Garment Workers' Union?" (p. 2582); "Did you ever hear anybody in the factory say that Ross Todd represents the employers about labor matters?" (p. 2593) etc., etc. *The answers to all these questions were in the negative.* Those and many other similar answers constituted testimony as to *facts*, not conclusions.

But we also submit that the answers that the employees "joined the DGWU of their own free will and without coercion on the part of the petitioner" is testimony as to a *fact—i. e.* the state of mind of the witnesses —and as to the *fact* that such state of mind was not created by duress of petitioner. And who would know that fact better than the employees concerned?

Respondent respectfully submits that the Board's refusal to treat as material the unanimous testimony of the employees concerned that they formed and joined the DGWU as their voluntary choice of a bargaining agency, was not only a flagrant abuse of its own power (*Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, l. c. 226; *Indiana and Michigan case, supra*, l. c. 28; *NLRB* v. *Laister-Kauffmann Aircraft Corp.*, (C. C. A. 8) 144 F. 2d 9, l. c. 16), but was also a flagrant disregard of the Court's ruling.

The Court was "not in error" in its ruling on this matter.

(3) Failure to receive evidence as to events in 1934-35.

The Board over respondent's objections (III, 1110 a, b, c,) received in evidence hundreds of pages of testimony given in an invalid Labor Board proceeding back in 1934-35 (prior to the enactment of the National Labor Relations Act). Respondent contends, and the Court below ruled (XIII, 48), that having admitted the Board's and ILGWU's evidence as to the 1934-35 activities, the Board should not have excluded respondent's countervailing evidence and cross examination relating to the same period and events (VIII, 2823-25, 2887-8, 2896; X, 3757; A, 278, 281, 285, 287). The Board based its finding (erroneous, we claim) of respondent's "hostility to unions" on such evidence (X, 3869, 3871, 3885-6). The relevance and materiality of such countervailing evidence and cross examination as to these matters, and the unfairness of excluding it seems too obvious to require further discussion. The Court below was "not in error" in ruling that it should have been received and considered.

(4) Failure to receive evidence of provisions of ILGWU contracts.

The issue here is not the general, abstract question of whether in a unfair labor practice proceeding the contracts of the complaining union with other employers are admissible, as petitioner seems to present it. The relevance of the evidence is based upon the fact that the Board and ILGWU devoted much time and evidence in an effort to show that the contracts between respondent and the DGWU were "sham" contracts (I, 160d, 160g, 161-2, 205-6), in support of their contention that the DGWU was dominated by respondent. They pointed to the provision in the DGWU contract that members of the bargaining committee

must have been employed for a year by the respondent (I, 160d, 160g), as showing company domination. To rebut this and show that the provision was a proper and usual one in union contracts and hence no proof of domination, respondent offered to prove that the ILGWU contracts contained similar provisions (VI, 1656, 1661-2, 1669). Such evidence was clearly competent for that purpose and its materiality is shown by the Board's adverse findings based on the very contention which this rejected testimony would have refuted (X, 3879). The Court was "not in error" in ruling such contracts admissible for the purposes offered.

(5) Refusal to receive evidence that Instructors, Thread Girls and other employees of respondent, held by the Board to be Supervisory Employees, were not so considered in trade unions generally, including the ILGWU itself, but were eligible to union membership.

One of the chief bases of the Board's decision against respondent is that the employees known as Instructors, Thread Girls, Head Pattern Maker (Mrs. Strickland) Head Cutter (Mr. Scoles), Examiners, and certain other employees, participated in the formation of the DGWU and were members of it and that their participation therein rendered that Union a dominated union, on the ground that such employees were "representatives of the management" (X, 3875-3878). To refute this finding or inference by the Board, the respondent sought to show by Wave Tobin, local manager of the ILGWU (X, 3788) and by the records of the ILGWU (X, 3790) and by Erwin Feldman, Counsel for many garment companies (X, 3791-2), that such employees and employees holding similar positions in garment companies, were regarded in trade unions generally, including the ILGWU, as not being Supervisory Employees but as being eligible to membership and participation in such unions. The relevance of this evidence

for such purpose is apparent. In *International Assoc. of Machinists* v. *National Labor Relations Board*, 311 U. S. 72 (l. c. 80), this Court held that the test as to domination by alleged Supervisory employees was whether the employees generally "would have just cause to believe" that such alleged supervisory employees "were acting for and on behalf of the management." If employees in the garment industry generally *do not* regard such employees as supervisory employees and *do* regard them as eligible to join and participate in unions, those facts would have a bearing on the true status of such employees in the case at bar. It would also throw light on the credibility and effect to be given to the testimony of the employees and of respondent's officers as to the status of such alleged supervisory employees (*Indiana and Michigan case, supra*, l. c. 24-27).

In fact, the Board itself has used this very type of evidence for this very purpose: In *Reid, Murdock & Company*, 56 NLRB No. 57, The Board said: "The Union has included keymen of similar work status in its bargaining contracts with the company's competitors." (And the Board in that case found such "keymen" *not* supervisors but "ordinary production and maintenance employees.")

Under the Board's own decisions in other cases, the instructors, thread girls, Rose Todd, Hobart Atherton, head pattern maker, Mrs. Strickland, Mrs. Gray, the inspectors, and similar employees, were not supervisory employees but were eligible to membership in the DGWU and their membership and participation therein does not constitute domination, coercion or interference by the management:

Ranco, Inc., 57 NLRB No. 82, decided July 20, 1944, was an *unfair labor practice* case, similar to the case

at bar. The question was whether "group leaders" and "set up men" were supervisory employees. The "group leaders" were very much like the instructors in the case at bar—they *instructed* employees, *gave them work*, etc. The Board said:

> "The basic question to be determined in order to resolve the issues concerning interference, restraint, and coercion on the part of the respondent and domination of the independent by the respondent is the alleged supervisory status of two classes of employees, namely, group leaders and set-up men. * * *
>
> "Group leaders *give work* to employees in the production or inspection line, *instruct* employees in their duties, ascertain whether they are supplied with work, obtain supplies and equipment for employees, and at times engage in production work alongside ordinary employees.
>
> "The record clearly establishes that neither group leaders nor set-up men have power *to hire, demote, or discharge employees, to grant raises or leaves of absence, or to recommend such action.* Their authority in this regard *is limited to reporting to their superiors*, either foremen or assistant foremen, the inefficiency of employees within their groups. * * * Although some employees testified that they regard set-up men and group leaders as their 'bosses,' the evidence establishes, in our opinion, that group leaders and set-up men perform no supervisory functions, being merely highly skilled employees, *and are not regarded as supervisors by the management, by the other employees, or by themselves.* Set-up men and group leaders were eligible to membership in both the Independent and the Union; several joined either one or the other organization. At the hearing, Lewis Strickland, the Union's International Representative, *admitted that group leaders and job-setters were members of the Union* and stated that their continued eligibility to membership was 'a matter for me to de-

termine later on.' In view of all the evidence, we find that group leaders and set-up men were not supervisory employees. * * * We conclude that the respondent is not liable for their activities and statements."

In *Industrial Rayon Corporation*, 56 NLRB No. 104, decided May 15, 1944, the Board held that section *inspectors* and the *head inspector* in the cone packing department were *not* supervisory employees, saying:

> "While they are responsible for the quality of the work produced, they do not supervise production employees *in the sense that they have the power to hire, discharge, lay-off, discipline or otherwise effect changes in their status.* Rejection by them of the work of the production employees does not have any direct or significant effect upon the earnings of these employees; *they have no voice in determining or shaping the labor policy of the company.* It is clear, therefore, that *in the area of labor relations and policy*, these employees do not constitute management *in the eyes of the rank and file* as do truly supervisory employees."

(And to the same effect, see: *Dortch Stove Works, Inc.*, 58 NLRB No. 82; *Reid, Murdock & Co.*, 56 NLRB No. 57; *Yale & Towne Mfg. Co.*, 56 NLRB No. 193; *Land O'Lakes Creameries, Inc.*, 53 NLRB No. 170.)

Although respondent contends that the "Instructors," "Thread Girls," etc., were in no sense supervisory employees and hence properly participated in the Donnelly Garment Workers' Union under the Board's former decisions, now the Board has gone further and held (in the United Mine Workers' case, announced in the press on March 7th, 1946) that it is *proper* for *foremen* (admittedly "Supervisory" employees) to be included in Unions *with production "workers."*

The Court below was "not in error" in ruling that such offered evidence should have been received.

(6) Refusal to permit respondent to examine Wave Tobin as to threats and violence of ILGWU, and concerning eligibility of "instructors," etc., to participate in unions, and generally.

The Trial Examiner refused to let respondent examine Wave Tobin at all (VIII, 2561-2-3; IX, 3257). After first letting her testify for a short while, he stopped her testimony (VIII, 2543), ruling that he would first hear the 1,200 employees (VIII, 2556, 2561). But later he refused to let her be recalled to the stand to testify as to anything (X, 3257, X 3783), rejecting respondent's offers of proof 1-SSSSS and 1-TTTTT (X, 3787-3790), and struck out entirely the little testimony which she had given (IX, 3257). The Board's refusal to permit respondent to call and examine Wave Tobin therefore became not merely a ruling on the "order of proof," but the *total exclusion* of Wave Tobin as a witness, and hence was arbitrary, unfair, and contrary to all concepts of a fair trial. The Court was "not in error" in ruling that such testimony should have been received.

We respectfully submit that as to each and all of the six items or types of evidence excluded, the Court below was "not in error" in ruling that it should have been received by the Board, and further submit that if the Court was right as to *any one* of the six items, this Court should not disturb the decision by writ of *certiorari*.

(b)

THE COURT WAS NOT IN ERROR IN RULING THAT THE BOARD SHOULD HAVE DESIGNATED A DIFFERENT TRIAL EXAMINER FOR THE SECOND HEARING.

Respondent in its Application for Designation of Another Trial Examiner for the second hearing made a very

strong showing that Trial Examiner Batten had prejudged respondent's most important evidence (A, 475, 483, 493). Batten's mind was completely saturated with the view that the testimony of the 1,200 employees concerned, as to "how and why" they formed and joined the DCWU and that they did so freely and voluntarily, without coercion, was completely worthless and immaterial. It was, therefore, impossible for him to fairly evaluate that testimony, as respondent was entitled to have it evaluated.

The Court below is entitled to some latitude and discretion in determining whether it shall enforce an order of the Board upon a hearing so conducted (*Indiana and Michigan case, supra*, l. c. 28). It was not merely a question of Batten's erroneous rulings in the first hearing, which could be reviewed on appeal; it was a question of "preventing his future action in the pending cause" (*Ex Parte American Steel Barrel Co.*, 230 U. S. 35, l. c. 44) when he had pre-judged the case. Here the circumstances amply justify the Court's ruling that the Board should have appointed a different Trial Examiner for the second hearing (*NLRB* v. *Washington Dehydrated Food Co.*, (9 C. C. A.) 118 F. 2d 980, l. c. 997; *NLRB* v. *Henry K. Phelps, Jr., Trustee*, (5 C. C. A.) 136 F. 2d 562, l. c. 566-7).

(c)

IN ANY EVENT, THE COURT'S RULINGS WERE NOT SO COMPLETELY WRONG AS TO CONSTITUTE AN ABUSE OF ITS JUDICIAL POWER AND DISCRETION.

As said in the *Indiana and Michigan case, supra*, l. c. 16, the Court below must "not only have been in error" but must also "have abused its judicial discretion," to warrant this court in reviewing its decision.

Congress in setting up the procedure under the National Labor Relations Act vested in the Circuit Court

of Appeals the power and discretion of determining (under certain limitations) whether the Board's order should be enforced. It was not contemplated by Congress that every decision by the Circuit Court of Appeals should be reviewed by this court. Congress was familiar with the policy of this court that it would not ordinarily review on certiorari decisions of the Circuit Court of Appeals except those falling within the scope of Rule 38 of this Court, and, with that knowledge, Congress made no further provision for review by this court of Labor Board cases. A wide latitude of discretion must be allowed to the Circuit Court of Appeals in passing upon such matters. For example in *NLRB* v. *Sands Mfg. Co.*, 306 U. S. 332, l. c. 341-2, this Court held that certain statements by certain alleged supervisory employees did not, under the circumstances, constitute evidence of the employer's policy and in the *International Machinists case, supra* (l. c. 80), this court laid down the rule that whether the statements of an alleged supervisory employee constitute domination depends not so much on the nature of the employee's position but on whether the employees generally have "just cause to believe" that he is speaking for the management. Under these rulings, there is a wide range within which the Circuit Court's discretion and determination as to the relevance and materiality of evidence excluded by the Board should be given finality in enforcement cases and not be reviewed by this court on certiorari.

The case at bar comes especially within that range for the court below has in good faith exercised its power and discretion upon six different types of evidence and in so doing it has not abused its discretion, "even though in this court's view such evidence would be a matter of indifference" (*Indiana and Michigan case, supra*, l. c. 16).

II.

The decision of the court below does not involve questions of such importance or character as to call for the issuance of certiorari by this court.

Our comments (pp. 20-21, *supra*) are also applicable here.

This case is peculiarly one in which this court should not disturb the decision of the court below. The grounds upon which the court below based its decision are *procedural matters* and *questions of evidence*. This court has in many decisions established the general rules governing the admissibility of evidence and a reiteration of those rules in a review of this case would serve no useful purpose. No two cases are exactly alike on the facts and no absolute criteria can be established to govern future rulings by inferior courts on such question. The Circuit Court of Appeals must be given a wide latitude in the exercise of their power and discretion in such matters. We respectfully submit that the case does not fall within any of the categories embraced in Rule 38 of this court.

It is true that the court below stated in its opinion (XIII, 51) that it believed the Labor Board would be justified in applying for certiorari. However, the court below did not deem the questions of sufficient importance or have such doubt concerning how they should be answered as to cause that court to certify the questions to this court for answer, as it was entitled to do under the statute (28 U. S. C. A., Sec. 346). True, as stated by the court below, the decision is an important one to the parties, namely, the Board, the Respondent, the Respondent's Employees, and the International Ladies Garment Workers' Union—but what case is not? It is important to the public only in the sense that all questions which involve the ruling of a public body, such as the Labor

important. But under Rule 38 this court does not ordinarily consider importance of that nature a sufficient ground to disturb decisions of Circuit Courts of Appeal, unless the guidance of this court is needed for future decisions.

We respectfully submit that certiorari should be denied for lack of general judicial importance of the rulings below.

III.

The decision below does not conflict with decisions of this court or with decisions of other circuits.

Petitioner says (p. 34) that the decision below (as to the materiality of the "employee testimony") conflicts with *Bethlehem Steel Co.* v. *NLRB*, 120 F. 2d 641. In the Bethlehem case there was a *prior company-dominated* Plan—and the court said (l. c. 653):

> "Since the organization, structure, and Company support of the Plans ensure Company dominance and violate the Act, this testimony would have been irrelevant."

The court's holding of immateriality is based on the fact of the company's domination of the *prior union*. But that is not the situation here. Here there was no prior union, and hence there is no conflict with the Bethlehem Steel Co. case.

In the prior decision herein of the Court below that court said (123 F. 2d l. c. 222):

> "This was *not a case* where domination and support by an employer of an independent union was conceded or *where the independent union was conclusively shown to be of a character which could not, in any event, act as the bargaining representative* of its members. The evidence of the Board which tended

to show domination and support of the independent union by the Company *was circumstantial.*"

Nor does the decision below conflict with *Western Cartridge Co.* v. *NLRB*, 134 F. 2d 240. In quoting from that case, pp. 36-37, petitioner stopped short of the paragraph immediately following the part quoted, which reads (l. c. 244):

> "In the instant case, the record discloses that the examiner permitted Independent to adduce the testimony of witnesses *who had participated in its organization* as to their reasons for joining, but that he refused to receive the testimony of *several thousand* employees as to their reasons for joining the Independent *after* its formation."

Here the Trial Examiner and Board refused to consider as material the testimony of the employees *who participated in organizing* the independent union. That clearly differentiates the two cases.

The other cases alleged (pp. 37-38) to be in conflict with the decision below are distinguishable in that *they each involve a prior company dominated union* or plan and that the new union or plan was merely a continuation under a new name, and hence was invalid under the holding of this Court in *NLRB* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241. Such holdings are therefore not in conflict with the decision at bar where there was no prior union.*

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*The Board, realizing this obvious distinction and seeking to overcome that obstacle so as to bring the case within the ruling of the Newport News case, attempted to fashion a "prior union" out of a social organization existing among the Donnelly employees known as the Loyalty League, which organization however never approached the status of a labor union in any way. It never dealt with the Company as to wages and working conditions, it had no dues, held no regular meetings and, according to the testimony and offered testimony of the 1,200 employees, was not connected with the Donnelly

Petitioner concedes (p. 38) that *NLRB* v. *Swank Products, Inc.*, (C. C. A. 3) 108 F. 2d 872, 875, is in harmony with the decision below. So is that of the 5th circuit in *Humble Oil & Ref. Co.* v. *NLRB* (113 F. 2d 85 l. c. 91). And see also the eight cases cited by the court below in its former opinion, 123 F. 2d, beginning at the bottom of page 222.

The cases cited by petitioner at p. 39 as being in conflict with the decision below that the Board should have designated a different Trial Examiner for the second hearing are not in conflict but are distinguishable.

In *NLRB* v. *Air Associates, Inc.*, 121 F. 2d 586, the court (quoting from *NLRB* v. *Ford Motor Co.*, 114 F. 2d 905, 909), concedes that: "each decision must be based upon the peculiar facts of the case involved and the cause and degree of the impropriety" (l. c. 589), and pointed out that even if the Examiner were biased it would not upset the Board's order "since respondent does not assert that the Examiner committed any error in the admission or exclusion of evidence" (l. c. 589). (How different from the case at bar, where not only does the respondent assert, but the court below finds, that the Trial Examiner committed error in excluding six different classifications of material

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Garment Workers' Union in any way but its activities were purely social (III, 762; I, 37, 187; II, 643, 561, 622, 652, 676, 678-9; VIII, 2581-2, 2632, 2718, 2727, 2777-8, 2860, 2827-8; IX, 3011, 3052, 3090, 3129-30, 3196). In fact, the Board's own witness, Etta Dorsey, a very hostile witness, let the truth as to the true status of the Loyalty League escape her when she testified (IX, 3362-3):

"Q. As a matter of fact, that was all the Loyalty League was, a social group?

A. Yes, a kind of get together and get acquainted affair, and plan on good times and things like that.

Q. Yes, you had parties and picnics.

A. Yes, **that was the object of it.**"

And the Board's witness, Mrs. Keyes, testified similarly (X, 3653):

"Q. [illegible] activities in the Loyalty League other than

and competent evidence!) Also the court in the Air Associates case says: "But here the trial examiner made no decision and his tentative findings *were disregarded*" (l. c. 590). (How, different, here, where the entire Intermediate Report of the Trial Examiner was adopted *verbatim* by the Board, except for a minor correction stated by the Board at A, 620.)

In *NLRB* v. *Weirton Steel Co.*, 135 F. 2d 494, the court pointed out that "the trial examiner against whom most of the accusations of unfairness are made was superseded long before the end of the hearings and made no intermediate report," and that "When the second trial examiner took charge of the hearings, he afforded the Company a full opportunity to offer any evidence which it had previously been prevented from introducing" (l. c. 496). This fact situation is so different that there is no conflict with the case at bar.

In *NLRB* v. *Botany Worsted Mills*, 133 F. 2d 876, it likewise appears that there is no similarity between that case and the one here. The statements of the Trial Examiner most complained of was that he "was bound by prior rulings of the Board upon the very case in hand" (l. c. 882). The court also said, concerning the Trial Examiner's ruling on evidence, etc.: "In the view we take of the case, there was no error in these rulings" (l. c. 882). (How different from the situation here where the court below holds that the Trial Examiner and Board erred in many different respects!)

Nor does *Ex Parte American Steel Barrel Co.*, 230 U. S. 35, aid petitioner. On the contrary in that case this court said of the rule for disqualifying judges that:

> "It was never intended to enable a discontented litigant to oust a judge because of adverse rulings

made, for such rulings are reviewable otherwise, *but to prevent his future action in the pending cause*". (l. c. 44).

That is precisely what respondent sought here in asking for a different Trial Examiner—"to prevent his (Batten's) future action in the pending cause"—after he had *prejudged* respondent's most important evidence as worthless and immaterial and had expressed such pre-judgment in terms so positive and unequivocal (A, 484, 486, 492) as to show beyond question that he could not in the second hearing fairly evaluate such testimony or accord to it any weight whatever.

There is obviously no conflict between the case at bar and the *American Steel Barrel* case but, rather, the latter case *supports* the holding of the Court below.

Likewise the case of *Berger* v. *United States*, 255 U. S. 22, is not in conflict with the case at bar. That case is one of the leading cases holding that it is essential to judicial administration that a litigant have a fair trial before an unbiased judge. It holds that a showing which gives "fair support" to the charges of a "bent of mind" that "may" impede impartial judgment, is sufficient. The decision below is in harmony, not in conflict, with that view.

Petitioner (p. 39) misconceives the importance of the Trial Examiner in the procedure set up by the NLR Act. While the Trial Examiner does not make decisions, his findings and recommendations in his Intermediate Report carry great weight with the Board, as do the findings of a Master, or of a lower court with appellate courts. If the Trial Examiner is biased or has pre-judged a case, it is well nigh impossible to prevent such bias or pre-judgment from being carried forward into the Board's deci-

sion. The instant case is an excellent example, as the Board here accepted the Trial Examiner's report *in toto*.

In Paragraph 2 (p. 40), Petitioner again cites *Bethlehem Steel Co. v. NLRB*, 120 F. 2d 641, as being in conflict with the decision below on the admissibility of certain provisions in ILGWU contracts. As pointed out, *supra*, the issue is not whether those contracts were admissible *generally*, but to rebut the Board's and ILGWU's evidence and contentions. In the Bethlehem Steel Co. case the purpose was to make a *general* showing "regarding the dates, scope, duration and terms of the agreements * * *" (l. c. 651). The Court held the contracts were irrelevant for such purpose. That holding does not conflict with the holding here.

Under Paragraph 3 (p. 41), the Board cites two cases as being in conflict with the decision below on the question as to whether evidence was admissible tending to show that employees of the same or similar status as the Instructors, Thread Girls, Examiners, etc., were generally regarded in the garment industry and unions, including the ILGWU, as not being supervisory employees and as being eligible to union membership. Here again, the contentions of the Board in the hearings must be considered in determining the relevance and materiality of the proffered evidence. We have discussed this at pp. 15-19, *supra*.

With this background it is apparent that the case of *NLRB v. Aintree Corp.*, 132 F. 2d 469, is not in conflict with the decision below.

Nor does *New Idea, Inc., v. NLRB*, 117 F. 2d 517, conflict with the decision below. In fact, apparently, the Board there admitted the very kind of evidence that the Board here excluded (l. c. 524). The question of the admissibility of such evidence was not involved.

At p. 42, the Board veers from its argument as to conflict of cases, to argue that even if relevant and material, the Board was justified in rejecting such evidence because it was not covered by the remand. This argument is fallacious for at least four reasons:

1. The Board by its evidence at the second hearing bearing on the supervisory status of Instructors and Thread Girls (IX, 3324-5, 3434-5-6-7; X, 3481-2, 3554, 3642, 3644, 3650-1-2, 3673, 3675,) made admissible this rebuttal evidence, whether covered by the remand or not.

2. The Trial Examiner permitted the Board great latitude in putting in additional testimony in the second hearing to bolster its case in chief (over respondent's *strenuous* objections, IX, 3276-3288, incl., 3292-3309, incl.; 3330-3332, incl.; 3471-2; 3486; X, 3552, 3640-1, 3666) and it little behooves the Board to complain that the respondent in rebuttal thereof sought also to add to its defense in chief.

3. It was fairly within the terms of the remand which was for the purpose of receiving and considering "all of the competent and material evidence" (123 F. 2d l. c. 225) which the Board had rejected at the first hearing, including "how and why the employees came to organize" the DGWU (l. c. 222). Also the Board at the first hearing had rejected the ILGWU contracts which respondent had offered in evidence, and the Board had striken out in its entirety Part B of respondent's answer, relating to the conspiracy of violence and fraud on the part of the ILGWU. If all this evidence had not been rejected at the first hearing, the respondent would in connection therewith have adduced evidence on the points in question.

Lastly, and in any event, the Court's ruling as to this one item of evidence, even if erroneous, is not such

an abuse of its discretion and power as to invalidate its decision on the other five types of evidence which it held the Board should have received and considered.

Under Paragraph 4 (pp. 43-44), petitioner argues the correctness of the Trial Examiner's ruling that respondent could not adduce evidence of matters occurring more than six months prior to the first hearing, while permitting the Board to go into such matters. It appears to us that the mere statement of this matter shows the unfairness of such a ruling, and respondent protested vigorously against it, to the Trial Examiner, at the time (VIII, 2309, 2823-25, 2887-8; Assignments of Error Nos. 243, 244, 248, 249; A, 278-280, 285-87; X, 3757), but without avail. The question therefore is not whether such evidence was offered in the first hearing but whether in the second hearing the Board should be permitted to bolster its case in chief and at the same time respondent should be denied the opportunity to refute such additional testimony.

Under Paragraph 5, pp. 44-49, petittioner argues that the Court below erred in its ruling as to the admissibility of evidence concerning the ILGWU conspiracy. We have presented this under Point I, *supra*.

Petitioner obviously labors in its efforts to show that the court below misinterpreted or misapplied the ruling of this court in the *Indiana and Michigan case*, *supra*, but it is clear from the opinion that the Court below had none of the misconceptions which petitioner attributes to it.

If respondent had been permitted to show the matters alleged in Part B of its answer (stricken by the Board A, 508), it would clearly have shown a situation within this Court's language in the *Indiana and Michigan case*, that—

"* * * if it should appear that the charge is so related to a course of violence and destruction, carried on *for the*

*purpose of coercing an employer to help herd its employees into the complaining union * * *".* (1. c. 19).

That was exactly what the ILGWU was seeking to do here (See Part "B" of respondent's answer, A. 387-8).

CONCLUSION.

In *Ford Motor Co. v. NLRB*, 305 U. S. 364, 373, this court held that the Circuit Court of Appeals "may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action * * * to secure a just result with a minimum of technical requirements."

The decision below is in accord therewith.

Certiorari is ordinarily only granted when necessary to do substantial justice. To grant it here would do *injustice* both to respondent and to its employees who have *unanimously* freely chosen and maintained the DGWU as their bargaining agency for seven (now nearly nine) years. Respondent respectfully submits that this honorable court should now terminate this unjustifiable litigation, by denying certiorari.

Respectfully submitted,

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